INDEPENDENT SECTOR

The national leadership forum fostering private initiative for the public good

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VIA E-MAIL AND HAND DELIVERY

August 21, 2002

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice 2002-13

Dear Ms. Dinh:

We submit the enclosed comments on behalf of the membership of INDEPENDENT SECTOR, relating to the proposed rules regarding electioneering communications under the Federal Election Campaign Act as modified by the Bipartisan Campaign Reform Act of 2002. We also request the opportunity to testify at the Commission's hearing on these proposed rules.

INDEPENDENT SECTOR has a long-standing commitment to ensuring the proper level of government oversight of the nonprofit sector, and, therefore, we have great interest in sound implementation of the new electioneering communication rules. We look forward to working with the Commission on these rules and to testifying on these matters.

Sincerely,

Sara E. Melendez
President

Enclosure

COMMENTS OF INDEPENDENT SECTOR ON
THE PROPOSED RULES
REGARDING ELECTIONEERING COMMUNICATIONS
(NOTICE 2002-13)

We submit the following comments on behalf of INDEPENDENT SECTOR, a coalition of corporate, foundation, and voluntary organization members which serves as a national forum to encourage giving, volunteering, and nonprofit initiatives. These comments are in response to the Notice of Proposed Rulemaking issued by the Federal Election Commission (the "Commission"), Notice 2002-13. The proposed rules implement the amendments to the Federal Election Campaign Act ("FECA") made by Title II, Subtitle A of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), relating to electioneering communications. We also request the opportunity to testify at the Commission's hearing on these proposed rules.

INDEPENDENT SECTOR is submitting comments because we are concerned with ensuring that the rules provide clear guidance to our members and the nonprofit sector generally regarding what communications are within the definition of "electioneering communications." We are also concerned with ensuring that the rules contain appropriate exceptions to that definition so as to avoid restricting speech that does not have the effect of supporting or opposing the election of any Federal candidate. While we generally support the exceptions already provided by the proposed rules, we also believe an exception is needed that will protect unpaid communications, including public service announcements and documentaries, particularly when such communications are made by organizations described in Section 501(c)(3) of the Internal Revenue Code.

Our comments are presented in an order that corresponds to the sequence of the proposed rules and the supplemental information relating to those rules provided in the Notice and are not intended to reflect the relative importance of the individual comments.

SPECIFIC COMMENTS

1. Proposed 11 C.F.R. § 100.29: Electioneering Communications

INDEPENDENT SECTOR supports the general definition of electioneering communications provided in the proposed rules, including the definitions of "refers to a clearly identified candidate," "broadcast, cable, or satellite communications," and "publicly distributed," as being both consistent with BCRA and providing clear guidance regarding what generally constitutes an electioneering communication. We also support the rule for classifying special or runoff elections provided in proposed 11 C.F.R. § 100.29(a)(2) because it is a reasonable interpretation of BCRA. And we support the Commission's decision to not, at this time, propose rules to implement the alternative statutory definition of electioneering communications, because not proposing such rules will help limit confusion regarding which definition is currently applicable.

Presidential Primary Candidates

We agree with the Commission that the definition of electioneering communications would be overbroad and therefore potentially unconstitutional if it included all broadcast, cable, or satellite communications that mentioned a presidential candidate anywhere in the country during the primary season. We therefore support the inclusion of a provision limiting the definition in this respect to such communications that are received by 50,000 or more persons in a State in which a primary, convention, or caucus will be held. Inclusion of such a provision is consistent with the intent of BCRA to reach broadcast, cable, or satellite communications

publicly distributed shortly before an election to a significant number of the relevant electorate. Of the two alternatives proposed, we favor Alternative 1-B because it avoids sweeping in broadcast, cable, or satellite communications anywhere in the country 30 days before the national nominating conventions, the inclusion of which is unnecessary given that the national nominating conventions are events at which only party delegates vote. We also favor Alternative 1-B because it lists the types of events (primary or preference election, or convention or caucus of a political party) that are relevant, which makes the rule more understandable to the lay reader, unlike Alternative 1-A, which only defines the relevant events by cross reference to another regulatory provision.

Proposed Exceptions

INDEPENDENT SECTOR supports the proposed 11 C.F.R. § 100.29(c)(1) list of the types of communications that are not included in the definition of electioneering communications, as including such a list provides clearer guidance for persons seeking to determine whether a particular communication is within the definition. We particularly support the clarification that communications over the Internet, including electronic mail, are not electioneering communications as long as they are not also distributed by broadcast, cable, or satellite television or radio station, and agree that this clarification is consistent with BCRA. Consistent with this provision, we urge the Commission to add a statement that communications over the Internet are excluded regardless of what equipment is used to access the Internet, whether a computer, television, cell phone, or other hardware.

We also support the provisions implementing the statutorily provided exceptions for candidate debates or forums and news stories, editorials, and commentaries, and agree that the latter exception should apply regardless of whether those communications are from broadcast,

cable, or satellite television or radio stations. We do not express an opinion, however, regarding the second sentence of proposed 11 C.F.R. § 100.29(c)(2), relating to when news stories distributed through a station owned or controlled by a political party, political committee, or candidate, would not be considered electioneering communications. We also support the exception for communications where the sole reference made to a Federal candidate is a reference to the popular name of a bill or law, as long as the Commission develops a definition of "popular name" that limits that term to the unique name generally used by the media for any given bill or law. For example, the media generally used the name "Shays-Meehan bill" for the campaign finance reform bill introduced as H.R. 380 in the current Congress, but not the name "Shays-Meehan-Wamp bill" (Rep. Wamp was listed as the third co-sponsor on H.R. 380).

Exception for Pending Legislative or Executive Matters

INDEPENDENT SECTOR strongly supports the creation of an exception for communications designed to urge the public to contact their public officials regarding pending legislative or executive matters. Many important policy matters are decided during the timeframes provided by the general definition of electioneering communications, particularly during the 30 days before primary elections when Congress is usually in session. All such communications cannot be restricted. Such restrictions on communications would prevent organizations from exercising their constitutional rights to communicate with the public and their elected officials on legislative and executive matters — including matters of vital importance to the organizations.

Of the four proposed alternatives, we favor Alternative 3-B with minor modifications. Alternative 3-B is preferable to 3-A because certain terms used in 3-A, such as "promoting, supporting, attacking or opposing," are so vague that they limit its usefulness. We do not favor alternatives 3-C and 3-D because they would both appear to allow communications that present

the candidate mentioned in a favorable or unfavorable light, which would be contrary to the requirement in FECA Section 304(f)(3)(B)(iv) that any exceptions beyond those explicitly provided by statute must not allow communications that promote, support, attack or oppose a Federal candidate within the meaning of FECA Section 301(20)(A)(iii). Alternative 3-D is also too narrow because it does not cover communications that mention Federal candidates who are executive branch officials at the state or federal level. We recommend modifying Alternative 3-B, however, by replacing the words "brief suggestion" with "request, with contact information such as a telephone number, address or electronic mail address (other than contact information for a campaign office)," to eliminate any ambiguity created by the word "brief" and to clarify that the communication can include both a reference to the candidate and contact information for him or her. We also recommend adding to the end of this provision "(except for references to an upcoming legislative vote on the matter)" to clarify that such references to voting are permitted for communications that otherwise fall within this exception.

Exception for Unpaid Communications

INDEPENDENT SECTOR's membership includes many organizations, particularly organizations described in Section 501(c)(3) of the Internal Revenue Code (the "Code"), that produce and publicly distribute public service announcements, documentaries and similar types of educational, nonpartisan communications. Because of the educational and nonpartisan nature of these communications, the organizations that distribute them are generally not required to pay for the broadcast, cable, or satellite time for these communications, either because the owner of the broadcast, cable, or satellite station donates the needed time or because the organization is itself a public television or radio station or similar entity.

For example, one often rebroadcast television documentary is a behind the scenes look at the non-political side of the White House, which happened to be filmed during the Clinton Administration. It naturally mentions then First Lady Hillary Clinton. Without an exception for such unpaid communications, every New York public television station would be prohibited from broadcasting this documentary within 30 days of the primary election or 60 days of the general election in 2006, assuming now Senator Hillary Clinton chooses to run for re-election. As this example illustrates, failing to create an exception to cover such situations would require every organization that engages in such communications, including every public television and radio station in the country, to review all materials scheduled to be shown within the electioneering communications timeframes for even the slightest mention or picture of a current federal candidate, an enormous and otherwise unnecessary task. Such a result is contrary to the intent of BCRA and constitutionally suspect.

INDEPENDENT SECTOR therefore strongly recommends that the Commission include in the final regulations an exception for unpaid communications, *i.e.*, communications for which no payment is required for the broadcast, cable, or satellite time required for such communications, including communications made by the broadcast, cable, or satellite stations themselves. This exception would address the concerns raised by the Commission with respect to public service announcements, public access channels, and entertainment shows, as well as educational programming such as documentaries. To implement this exception, INDEPENDENT SECTOR recommends adding the following language to proposed 11 C.F.R. § 100.29(c):

> Is unpaid in that no payment is made or received for the broadcast, cable, or satellite time for the communication, including if there is no payment because the broadcast, cable, or satellite station is itself making the communication.

INDEPENDENT SECTOR is not alone is supporting such an exception. The Campaign Finance Institute's Task Force on Disclosure, a bipartisan group of experts on campaign finance issues, specifically limited its recommended definition for electioneering communications to paid advertisements or purchased program time in its report issued in February 2001. The Task Force included this limitation precisely because of concerns about the overbreadth of a definition that swept in clearly nonpartisan communications such as entertainment shows.

Exception for Unpaid Communications by Section 501(c)(3) Organizations

If the Commission chooses not to create an exception for all unpaid communications, INDEPENDENT SECTOR strongly urges in the alternative that the Commission create an exception for unpaid communications by Section 501(c)(3) organizations. Section 501(c)(3) organizations, which include most public television and radio stations, are already prohibited by federal tax law from engaging in any activities that would tend to support or oppose any candidate for elected public office. The Section 501(c)(3) prohibition on supporting or opposing candidates is vigorously enforced by the Internal Revenue Service and backed by severe penalties, including revocation of an organization's Section 501(c)(3) tax-exempt status. The IRS has repeatedly stated and successfully argued in court that this prohibition is a "zero tolerance" rule, so even one violation can result in revocation of tax-exempt status. Code Section 4955 also grants the IRS the power to impose on the violating organization a penalty tax of 10 percent of the expenditures for the prohibited activities, in addition to revocation, and a second tax of 100 percent if the organization fails to correct the improper expenditures and take other corrective actions satisfactory to the IRS. Section 4955 also imposes a 2.5 percent penalty tax on the organization's managers for knowingly agreeing to a violation of this prohibition, and a second tax of 50 percent if the managers refuse to agree to correct the expenditures. If the violation is

flagrant, the IRS can both impose these taxes immediately under Code Section 6852 and seek injunctive relief under Code Section 7409 to force the organization to immediately stop its prohibited activities.

We recommend that this exception be drafted as follows:

> Is an unpaid communication by an organization described in 26 U.S.C. 501(c)(3). An unpaid communication is one for which no payment is made or received for the broadcast, cable, or satellite time for the communication, including if there is no payment because the broadcast, cable, or satellite station is itself making the communication. An organization will be considered described in 26 U.S.C. 501(c)(3) only if it has applied for a determination letter from the Internal Revenue Service recognizing that it is so described (unless it is exempt from having to file the notice required by 26 U.S.C. 508), and only if the Internal Revenue Service has not revoked that status.

We have included in the proposed language the requirement that an organization have applied for a determination letter from the IRS confirming its tax-exempt status in order to prevent the creation of "throw away" Section 501(c)(3) organizations to support or oppose candidates. The creation of such organizations is already strongly discouraged by the fact that the managers of such organizations will be personally liable for Code Section 4955 taxes if they misuse a Section 501(c)(3) organization. The additional requirement of having applied for an IRS determination letter further prevents such attempts, as the application process requires the person submitting the application to describe the organization's planned activities under penalties of perjury.

Other Exceptions

If the Commission, despite these compelling reasons, refuses to create either of the above exceptions, INDEPENDENT SECTOR supports the creation of specific exceptions for public service announcements (PSA's) and public access channels. INDEPENDENT SECTOR also urges the Commission to expand the news stories, commentaries, and editorials exception so it explicitly

includes documentaries prepared or distributed by Section 501(c)(3) organizations. While some documentaries may already be covered by this exception, it is far from clear that all documentaries would be so covered, particularly given that the Commission has advised in other contexts that this exception only applies if the news story, commentary, or editorial is distributed by a "press entity." *See, e.g.*, Advisory Opinion No. 2000-13.

FCC Website

INDEPENDENT SECTOR strongly supports making it as easy as possible to comply with the electioneering communication rules. We therefore applaud the Commission for proposing the creation of a database to be maintained on the FCC website that will allow anyone to quickly and definitively determine whether a communication publicly distributed through particular broadcast, cable, or satellite stations will meet the 50,000-person threshold requirement for an electioneering communication. We also strongly support making reliance on the FCC database a complete defense to a violation of the rules, as provided in proposed 11 C.F.R. § 100.29(b)(5).

We would also urge the Commission to include information on its own website that would aid compliance with the electioneering communication rules. Such information should include a prominently displayed link to the FCC website's database. Such information should also include a plain English description of these rules, preferably in a question and answer format. Many nonprofit organizations, including smaller faith-based and community-based organizations, engage in communications that may fall within the definition of electioneering communications but cannot afford to hire outside counsel to advise them on such matters. In their sincere efforts to comply with the rules, they will be dependent on the information provided directly by the Commission.

2. Affiliated Entities

Responding to the Commission's request for comment on whether any section in BCRA would prevent an entity prohibited from making an electioneering communication from being affiliated with an entity that is permitted to make electioneering communications, provided that the permitted entity received no prohibited funds from the prohibited entity, INDEPENDENT SECTOR has not found any provision in BCRA which would prevent such affiliations. It is common in the nonprofit sector for various types of nonprofit entities to be affiliated while maintaining separate finances, including entities that would be prohibited from making electioneering communications being affiliated with entities that, for example, would be permitted to make such communications because they are a qualified nonprofit corporation within the meaning of proposed 11 C.F.R. § 114.10(e).

3. Proposed 11 C.F.R. § 114.14: Further Restrictions on the Use of Corporate and Labor Organization Funds for Electioneering Communications

Purpose

To determine whether the purpose of a provision of funds is to pay for an electioneering communication, INDEPENDENT SECTOR recommends that the following two factors should be considered. First, if the funds are provided for a purpose other than paying for electioneering communications, that should, absent evidence of an agreement to the contrary, lead to the conclusion that proposed 11 C.F.R. § 114.14(a) has not been violated. Second, if the funds are provided with a prohibition against their use to pay for electioneering communications, that should, absent evidence of an agreement to the contrary, lead to the same conclusion, even if the use of the funds is otherwise unrestricted.

Violation of Intent

The Commission asked for comments on whether a contributor should be liable in instances where they did not intend for their contributions to be used for electioneering communications but the recipient so used those funds. INDEPENDENT SECTOR strongly recommends that if a contributor's intent is not to pay for electioneering communications but the recipient of the contribution violates that intent, the contributor should not be held liable for that violation as long as they either explicitly or implicitly communicated this intent to the recipient. For example, such intent would be communicated if the contributor provided the funds with an understanding they would be used for a purpose other than paying for electioneering communications, even if the contributor did not communicate a specific prohibition against using the funds to pay for electioneering communications.

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INDEPENDENT SECTOR thanks the Commission for its consideration of these comments and looks forward to explaining them further at the hearing on these proposed rules. These comments are also submitted on behalf of the following members of INDEPENDENT SECTOR:

Alliance for Children and Families
American Cancer Society
American Foundation for AIDS Research
American Heart Association
National Council of Nonprofit Associations
Otto Bremer Foundation
Peter C. Cornell Trust